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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:

MAR 28 2011

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

[redacted]

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded to the director for consideration of the merits of the petition.

The petitioner is an accounting business. It seeks to employ the beneficiary permanently in the United States as an accountant pursuant section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. The director determined that, based on the minimum requirements listed in Section H.14 on the ETA Form 9089, the position did not require a member of the profession.

On appeal, counsel asserts that the phrase "reasonable combination of education, training and experience thereof" set forth in section H.14 of the certified ETA Form 9089 is mandated by DOL as a condition of approval, and does not mean that the required education and experience fall below the regulatory guidelines.[1] Counsel states that the director ignored a United States Citizenship and Immigration Services (USCIS) memorandum[2] that requires USCIS in the event of ambiguity to request clarification. Counsel provides a letter from [redacted] the petitioner's owner that states the minimum requirements for the proffered position are a master's degree in accounting with one year of work experience, or a bachelor's degree in accounting with five years of work experience. Counsel also submits an excerpt from DOL's Final Rule for the Form ETA 9089 labor certification process from *The Federal Register*, Vol. 69, 247, 77394 December 27, 2004, now codified at 20 C.F.R. § 656.17(h)(4)(ii).

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

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[1] *See* 20 C.F.R. § 656.17(h)(4)(ii).

[2] Memorandum from Michael D. Cronin, Acting Associate Commissioner, Office of Programs, and William R. Yates, Deputy Executive Associate Commissions, Office of Field Operations, *Educational and Experience Requirements for Employment-Based Second Preference (EB-2) Immigrants,* HQ 70/6.2, AD00-08, March 20, 2000. Counsel notes that the United States Citizenship and Immigration Services (USCIS) memorandum was the result of a settlement by legacy INS in *Chintakuntla v. INS.* No. C99-5211 MMC (N.D. Cal. May 4, 2000). Counsel asserts that the denial of the instant petition violates the settlement agreement.

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The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

The director determined that the proffered position did not require a member of the professions holding an advanced degree or the equivalent as stipulated under section 203(b)(2) of the Act because the ETA Form 9089, section H.14, states an alternative degree of a Bachelor's in Accounting and five years of experience, or any reasonable combination of education, training and experience thereof" are required for the proffered position.

The AAO notes that the language contained in section H.14 is required pursuant to section 656.17(h)(4) of the PERM regulations:

> (i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and
>
> (ii) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training or experience is acceptable.

The regulation intended to incorporate the Board of Alien Labor Certification Appeals (BALCA) holding in the pre-PERM case of *Francis Kellogg*, 1994-INA-465, 1995-INA-68 (Feb. 2, 1998) (en banc)[4] that "where the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications. . .unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable." The statement that an employer will accept applicants with "any suitable combination of education, training, or experience" is commonly referred to as *Kellogg* language. At the time the labor certification was filed, DOL was denying applications containing alternative requirements if section H.14 of the application did not contain the *Kellogg* language.

However, two BALCA decisions have significantly weakened this requirement. In *Federal Insurance Co.*, 2008-PER-00037 (Feb. 20, 2009), BALCA held that the ETA Form 9089 failed to provide a reasonable means for an employer to include the *Kellogg* language on the labor

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[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[4] See ETA, Final Rule, Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"], 20 CFR Part 656, 69 Fed. Reg. 77326, 77352-77353 (Dec. 27, 2004); *Demos Consulting Group, Ltd.*, 2007-PER-20 (May 16, 2007) (finding that the pre-PERM holding in *Francis Kellogg*, 1994 INA-465 (Feb. 2, 1998) (en banc) was purposely written into the PERM regulation).

[redacted]

certification. Therefore, BALCA concluded that the denial of the labor certification for failure to include the *Kellogg* language on the labor certification violated due process. Also, in *Matter of Agma Systems LLC*, 2009-PER-00132 (Aug. 6, 2009), BALCA held that the requirements to include *Kellogg* language did not apply when the alternative requirements were "substantially equivalent" to the primary requirements.

Given the history of the *Kellogg* language requirements at 20 C.F.R. § 656.17(h)(4)(ii), the AAO does not interpret this phrase to mean that the employer would accept lesser qualifications than the stated primary and alternative requirements on the labor certification. To do so would make the actual minimum requirements of the offered position impossible to discern, render largely meaningless the stated primary and alternative requirements of the offered position, and potentially result in any labor certification with alternative requirements ineligible for classification as an advanced degree professional.

While USCIS is not bound by the findings of the BALCA panel, the AAO finds their reasoning with regard to the placement of the *Kellogg* language on the ETA Form 9089 to be significant. Further, after consultation with DOL pursuant to its statutory consultation authority at section 204(b) of the Act, the AAO finds that the *Kellogg* language does not reduce the actual minimum requirements below a bachelor degree plus 5 years of experience. Thus the AAO withdraw the director's decision on this issue and finds that the proffered position qualifies for employment-based second preference classification.

In the instant matter, the petitioner must still establish that the beneficiary meets the minimum requirements for the second preference classification and the specific requirements stated on the labor certification application. Furthermore, the petitioner must establish that it has the continuing ability to pay the proffered wage for the position from the priority date of August 21, 2007 through the present.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issue stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn; however, the petition is currently not approvable for the reasons discussed above, and therefore, the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the AAO for review.